The best way to meet the requirements of the Act and to give cable operators flexibility is to set a ceiling for installation charges based on the total costs of installation plus a reasonable profit. The cable operator should be able to determine its own costs, based on the direct and indirect costs of installation, especially including costs associated with customer service and compliance with quality of service standards.

Cable operators should be permitted to set higher prices for more difficult and costly installations if they so desire, with each having a separate price ceiling.

C. Regulation Of Charges For Changes In Service Should Apply Only To Changes That Affect Basic Service.

Finally, the Commission should limit its rate regulation rules for service changes to those that affect basic service, consistent with the requirements of the 1992 Act.

As the *Notice* explains, the 1992 Act requires that the basic tier regulations also include standards and procedures for changes in equipment or service tiers. *Notice* at ¶ 74. This requirement is directed only at the basic tier. It does not require the Commission to adopt rules governing charges for changes among cable programming tiers or changes involving pay services.

Moreover, the Commission should not regulate the charges for changes in other tiers of service. There are many circumstances in which charges are intended to recoup actual costs over time. As noted earlier, an operator may offer free installation to customers who purchase basic cable service and a pay

channel. When it makes such an offer, the cable operator anticipates recouping the lost installation charges through its revenues from the cable services the customer purchases. If a customer takes advantage of this offer and then disconnects the pay channel after one month, a change charge may be the operator's only way of recovering the installation costs.[46/]

This is only one of many circumstances when a change charge, even if not strictly "cost-based," is necessary in order to assure that the cable operator does in fact recoup its costs of providing service. The cost factors in installing and changing service are indirect and complex,[47/] and cable operators set their charges at levels that recover their overall costs for these services, not the specific costs of installation or changes. No regulatory objective would be served by interfering with these cost recovery mechanisms beyond the minimum requirements of the 1992 Act.

46/ Cellular telephone companies follow a similar pattern when they offer low-cost cellular telephones. Typically the low-cost offers require six month or one year service contracts. A customer who disconnects sooner often has to pay a large disconnection charge to the cellular carrier.

47/ It is a misnomer, for example, to assume there are no costs involved in using state-of-the-art electronics to handle request for changes in service. Flipping a switch is not costly, but designing and building the requisite electronics into the cable plant is quite costly, and these costs must be recouped over time.

V. REGULATION OF LEASED ACCESS SERVICE

A. The Commission Should Use Benchmarks To Set Maximum Prices For Leased Access Services.

The 1992 Act also gives the Commission additional responsibilities for rate regulation of leased access services. *Notice* at ¶ 145. In order to assure that all of the requirements of the leased access provisions are met, the Commission should adopt a benchmark approach to leased access rate regulations, but permit variations under certain circumstances.

As a general rule, this benchmark should be based on the benchmark rate for cable programming services for each system. At a minimum, the operator must be permitted to charge a monthly lease rate equivalent to its per-channel benchmark for cable programming services multiplied by the number of subscribers to the system. In addition, the operator should be allowed to claim some percentage of advertising, sales or other revenue derived by the lessee.[48/]

This approach has the virtue of simplicity, and reflects the reality of the cable operator's economic position. Any channel devoted to leased access is a channel unavailable for revenue-producing programming. At the same time, a leased access channel carries many of the same costs as any other channel, plus those related to the provision of leased access. The benchmark rate for cable

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48/ Cable programming agreements often contain provisions for local advertising availabilities or other mechanisms whereby operators participate in the revenues generated.

programming services is a good proxy for the costs of the cable operator plus reasonable profits.[49/]

Moreover, Section 612 mandates that leased access arrangements must not adversely affect the financial condition of the cable operator.[50/] 47 U.S.C. § 532(c)(1). In that context, a maximum rate that reflects the

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49/ This normal maximum price should be subject to adjustment for services that create higher costs. A different benchmark should be generated, moreover for other kinds of programming. Cable operators should be permitted to establish higher rates for pay programming services or for programming that is likely to be offensive to some subscribers. Pay programming will reduce the operator's revenues from its own pay services and offensive programming may cause subscribers to terminate cable service altogether. For pay program services the rate must, at the least, compensate the operator for revenues generated by comparable services. However, it must also be understood that operators cannot be asked to "risk" any portion of the costs for lease of the channel upon the business success of the lessee. Accordingly, the lease rate cannot be based only upon actual subscribers to the service, but must include all subscribers to the system generally.

50/ Although cable operators are not permitted to exercise editorial control over the programming of potential channel lessees, operators are empowered to consider content in establishing a reasonable price. Likewise, in setting maximum allowable prices the Commission must take cognizance of the impact that some programming could have on the "operation, financial condition, or market development of the cable system." 47 U.S.C. § 532(c)(1). Leased channel programming that is "indecent" will be handled pursuant to Section 612(h) or (j), but there exists no comparable statutory relief for the operator confronted by other forms of highly offensive programming. The required carriage of this offensive programming may well cause the loss of subscribers. Thus, the fees in these circumstances must be adequate to compensate the operator for any lost subscribers and loss of goodwill in the community.

opportunity costs of giving up a channel is consistent with the statutory requirements.[51/]

The benchmark rate for leased access should apply only to the carriage of leased access programming. Billing and collection, studio services, and other ancillary services impose additional costs on cable operators and should not be included in any benchmark. These services should be the subject of separate negotiations between the cable operator and the leased access programmer provider.

This approach is consistent with the Commission's tentative conclusion that billing and collection services should be unbundled from the rates for leased access. *Notice* at ¶ 146. It also is consistent with the Commission's conclusion that a "leased access programmer would pay for the technical support it used." *Id.* at ¶ 157. Unless the charges for technical support were unbundled from the charges for carriage, this would not be possible.

The Commission must recognize that part time leased access programming imposes additional costs on the cable operator. Cable operators

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51/ As in the case of other benchmarks, a cable operator should have the opportunity to demonstrate that the benchmark for leased access services is too low. This is especially important in light of the mandate of Section 612(c)(1). And, in the event the number of potential channel lessees exceeds the number of channels available for lease, the operator should be free to accept bids for lease of channels that exceed the maximum rate permissible under the benchmark.

should be given the discretion to decide whether they want to take on the burdens and risks of part time lease.[52/]

When an operator chooses to accept part time programming, it should be allowed to charge differing prices for different day parts, so long as the overall price for a full day of part time service does not exceed the benchmark rate. If cable operators are not given this discretion, some day parts, notably prime time, will be greatly underpriced and others, like 2:00 - 4:00 a.m., will be greatly overpriced.

A surcharge should be allowed that reflects the additional costs of leasing a channel on a part time basis. These costs include administrative and technical costs as well as the opportunity cost of losing capacity on a particular channel. If the operator is unable to lease the remainder of the day, this could result in the part time programmer being charged the equivalent of the full time rate for the day. As long as this rate is not above the benchmark established by the Commission, this rate should be presumed reasonable.[53/]

52/ The operator should be given the same discretion with regard to programmers who lease channel capacity on a periodic basis, *e.g.*, only on certain days of the week or certain times of the year. Likewise, operators should retain the ability to decide whether or not to lease channels to resellers.

53/ In some instances, coordinating a number of part-time lessees may so complicate administrative and technical costs for the operator that any above benchmark rate would be warranted. The Commission, therefore, should consider adopting a rule that would permit percentage adjustments above the benchmark.

B. The Commission Should Regulate The Terms And Conditions Of Leased Access In A Manner That Provides The Parties With Maximum Flexibility.

Section 612(c)(4)(A)(ii) requires the Commission to establish reasonable terms and conditions for commercial use of leased access channels. Pursuant to this authority, the Commission asks whether there is a need to establish rules on tier location, channel position, and time scheduling for leased access use.

The Commission asserts that such regulation would provide increased uniformity and certainty in the leased access market, leading to greater use of leased access channels. At the same time, the Commission recognizes that such regulation might intrude on the discretion of the cable operator. The Commission seeks comment on how to balance these competing interests properly.

As discussed, pursuant to Section 612(c)(1), any regulation of the terms and conditions of leased access should not undermine the financial condition of the cable system. 47 U.S.C. § 532(c)(1). This clearly expressed legislative concern supports the position that channel and tier placements should not be subject to Commission rules, but should be left to negotiations between operators and programmers, so that operators can recover their costs.[54/]

54/ The Commission could accommodate additional charges for particular channel or tier placement by permitting the cable operator and leased access programmer to file a joint request for waiver of the benchmark. A showing that the parties had agreed freely to the additional charge should be sufficient justification to grant the waiver.

Involving the Commission in the placement issue raises significant legal questions.[55/] Decisions about channel placement are part of the cable operator's editorial functions. Any regulations that impinge upon those decisions will violate First Amendment rights. *See Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. Nat'l Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986) (invalidating must carry rules on First Amendment grounds). Regulations that assign leased access channels on a first-come, first-served basis could run afoul of the prohibition against regulating cable operators as common carriers. 47 U.S.C. § 541(c); *see also Nat'l Ass'n of Regulatory Commissioners v. F.C.C.*, 533 F.2d 601 (D.C. Cir. 1976).

The Commission also asks whether the operator should be required to offer technical and production facilities to leased access users. *Notice* at ¶ 157. There are two important considerations in establishing these requirements. First, as the Commission indicates in the Notice, leased access programmers should be required to pay for any technical support that is provided by the operator. *Notice* at ¶ 157. Second, to the extent that an operator is required to provide technical support, this requirement should not include the obligation to acquire equipment or technology that it does not already possess or in which it would not otherwise invest.

Both of these positions are consistent with Section 612(c)(1), which mandates that the terms and conditions of leased access should not adversely

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55/ The legal rights of other cable programmers also may be impinged upon by Commission rules.

affect the operations or financial condition of the operator.[56] 47 U.S.C. § 532(c)(1). The best way to safeguard the financial integrity of the cable operator is to allow the parties to negotiate the equipment and facilities to be provided and the allocation of costs.[57]

Section 612(c)(1) also answers the question, raised by the Commission in the *Notice*, of when an operator should be allowed to require a programmer to post a bond or deposit. As with other terms and conditions of leased access, the Commission's rules should allow a maximum amount of flexibility for the parties involved. Given the transitory nature of many commercial programmers and the difficulties inherent in successfully operating a leased access channel, an operator should be allowed to require a performance bond or deposit in any situation where the programmer has not prepaid the full amount for use of the channel.

The Commission questions whether operators should be required to apply the same terms and conditions for leasing channel capacity to affiliated and

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56/ Costs to accommodate leased access users may be far from inconsequential. New program services may be located on a satellite for which an operator has no receive capability.

57/ It should be noted that in some cases cable programmers have actually provided their own facilities, such as satellite down-link equipment, as an incentive for the operator to carry a program. Since the leased access provisions are designed to encourage competition in the delivery of commercial programming over leased access channels, the Commission should not limit the ability of the parties to enter into arrangements such as this when both parties agree that it is mutually beneficial to do so.

nonaffiliated programmers. Congressional silence on this issue does not vest the Commission with authority to adopt such rules.

As indicated in the Notice, the legislative history of the 1984 Act contemplates that operators would have the discretion to discriminate in their terms and conditions.[58/] The fact that Congress authorized the Commission to establish maximum rates, terms, and conditions does not indicate that it intended the Commission to take this discretion away from system operators. Imposing a requirement that affiliated and nonaffiliated programmers be treated equally also would be inconsistent with Section 541(c), which states that cable operators should not be regulated as common carriers.

A final issue that must be mentioned is the ability of the Commission to grant an operator special relief from terms and conditions established in this proceeding. Though not discussed in the Notice, there may be situations where enforcement of the Commission's leased access rules will create a hardship for the operator and subscribers. The Commission should provide for a waiver of the rules or some other form of special relief.

This issue is most likely to arise where a system has no existing capacity for providing leased access channels. In response to low demand for leased access channels in the past, many systems offer subscribers additional

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58/ The legislative history of the 1984 Act states "nothing in these provisions is intended to impose a requirement on a cable operator that he make available on a non-discriminatory basis, channel capacity set aside for commercial use by unaffiliated persons." H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984) ("1984 House Report").

programming services on channels that might otherwise be available for leased access. This will become more common with the enforcement of the must carry provisions of the 1992 Act, which will further limit the number of channels a system might have available for leased access.

The Commission should establish a procedure whereby a system which has no available channels for leased access could be granted a waiver from the Commission's rules. Without such a procedure, the system would be forced to eliminate programming that subscribers depend upon. The affected programming may be targeted to special audiences and carried in an effort to offer diverse programming.

There is no way to be sure that leased access programming will add any more diversity than the programming that it replaces, so the Commission should allow the system to continue offering programming that has proven to be popular with subscribers. This is particularly true where the proposed leased access programming has to be scrambled, so that a failure to waive the requirements would result in subscribers receiving less programming than they did before, a result clearly at odds with the 1992 Act.

C. The Commission Is Not Empowered To Set A Lower Maximum Rate For Not-For-Profit Programmers Than For Other Leased Access Users.

The Commission asks whether the 1992 Act "empowers [it] to set a lower maximum rate for leased commercial access for not-for-profit programmers" in order to assure the diversity of programming mandated by Section 612 of the

1934 Act. *Notice* at ¶ 153. The *Notice* also seeks comment on the need for special rates for not-for-profit programmers and the impact those rates would have on other programmers, subscribers, and cable operators.

The 1992 Act gives the FCC no authority to set lower rates for not-for-profit programmers. The 1984 Act gave cable operators discretion over the manner in which leased access was provided.[59/] They may choose to "consider the type of service that would be provided" in establishing rates and "[the Act] **does** contemplate permitting the cable operator to establish rates, terms, and conditions which are discriminatory." 1984 House Report at 51, 52 (emphasis added). But, significantly, "nothing in these provisions is in any way intended to deprive the cable operator from receiving a fair profit from the use of this designated channel capacity." 1984 House Report at 52.

The 1992 Act did not change this principle. Any action taken by the Commission which attempts to limit the rates that can be charged to certain classes of programmers, and which could prevent the operator from receiving a

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59/ Section 612(c)(1) of the Communications Act provides:

> [T]he cable operator shall establish, consistent with the purpose of this section, the price, terms and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development of the cable system.

47 U.S.C. § 532(c)(1).

fair profit, would be considered beyond the scope of authority granted by the 1992 Act.

D. The Alternative Dispute Resolution Procedure Is Appropriate To Resolve Disputes Over Leased Access.

The Commission seeks comment on the manner in which the current complaint procedure can be amended to provide for expedited resolution of disputes between system operators and aggrieved commercial programmers. Under the 1984 Act, programmers could file complaints against system operators in federal district court or at the Commission, though damages could only be awarded in district court. *See* 47 U.S.C. § 532(d), (e). Regardless of where the complaint was brought, Section 612(h) commanded the trier of fact to presume that an operator's rates, terms and conditions were reasonable.

Congress believed that the expense of litigation and the high burden of proof has combined to "limit the extent of use of leased access capacity. The cumbersome enforcement mechanism also might explain why some cable operators cite very low demand for leased access channels."[60/] In response to these problems, the 1992 Act grants the Commission authority to establish expedited dispute resolution procedures. 47 U.S.C. § 532(c)(4)(A)(iii). Pursuant to this authorization, the Commission has proposed three alternative methods of dispute resolution.

60/ H.R. Rep. No. 628, 102d Cong., 2d Sess. 39-40 (1992) ("1992 House Report").

The Commission's proposal would place the dispute resolution function within the Commission, but in a streamlined form, and would ease the burden of proof necessary to demonstrate a violation of the statute. The Commission proposes that programmers would only be required to file a simple petition setting out the facts which constitute the violation and the rule which is violated. If this petition is sufficient to establish a *prima facie* case of violation, the burden of production would shift to the system operator to disprove the allegations.

The Commission questions whether this approach is consistent with the presumption in Section 612(h) that an operator's rates, terms and conditions are presumed to be reasonable. Although the 1992 Act provides the Commission with the authority to implement more flexible procedures, there is no indication whatsoever that Congress intended to change Section 612(f) which holds that the price, terms, and conditions for use of channel capacity are reasonable and in good faith unless shown by clear and convincing evidence demonstrates to the contrary.

Unless an operator's proposed price, terms, and conditions are in conflict with any of the limitations that the Commission implements, they should be presumed to be reasonable and made in good faith. Upon a showing that the operator's price, terms, and conditions exceed those standards established by the Commission, an operator would have the burden of demonstrating that they are not unreasonable.

The Commission also proposed two alternate forms of dispute resolution that could be used to supplement the proposed streamlined procedures at the Commission level. The Commission indicates that it favors some form of Alternative Dispute Resolution ("ADR")[61/]

The Commission asks whether the parties should be permitted to choose ADR before a programmer establishes a *prima facie* case at the Commission. In general, as long as both parties agree that ADR serves their interests, there is no reason to burden the Commission with the obligation to hear a complaint resolvable by other means. The parties should also be allowed the same flexibility in deciding which issues are appropriate for ADR. As long as neither party is forced into a ADR proceeding, there is no reason for the Commission to limit the choices that are available to the parties.

The Commission also asks whether franchising authorities should resolve conflicts between system operators and aggrieved commercial programmers. The Commission suggests that local authorities may be better able to handle time-sensitive disputes. Considering the limited resources of many franchising authorities, their lack of experience in adjudicating such disputes, and the streamlined dispute resolution procedures that will be in place at the Commission, local authorities are not in a better position to handle time-sensitive disputes. There is no guarantee that an operator or complainant will be able to

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61/ Administrative Dispute Resolution Act of 1990, P.L. 101-552, 104 Stat. 2736 (1990). *See also Use of Alternative Dispute Resolution Procedures in Commission Proceedings in which the Commission is a Party (Initial Policy Statement and Order)*, 6 FCC Rcd 5669 (1991).

obtain a dispassionate resolution of the dispute by the franchising authority. For these same reasons, a franchising authority should not review the dispute as a prerequisite to review by the Commission.[62/]

The 1992 Act directed the Commission only to establish procedures and standards to govern leased access. If Congress had intended the franchising authority to undertake this additional role, it would have amended the 1984 Act accordingly.

VI. REGULATION OF BASIC CABLE SERVICES

Section 623(a)(3), adopted from the House bill H.R. 4850,[63/] establishes three requirements for certification. First, the franchising authority must adopt regulations that are consistent with Commission regulations. Second, the franchising authority must have "legal authority" to adopt, and the personnel to administer, these regulations. Finally, the procedural regulations for rate regulation proceedings must provide a reasonable opportunity for consideration of the views of interested parties.

62/ There is a concern that franchising authorities, acting as mediators, will have access to confidential information that they would not otherwise be entitled to receive.

63/ H.R. 4850, 102d Cong., 2d Sess. (1992).

A. Rate Regulations Must Be Adopted By Franchising Authorities Prior To Certification.

Subsection 623(a)(3) provides that a franchising authority must certify that it "will adopt and administer regulations with respect to the rates subject to regulation . . . that are consistent with the regulations prescribed by the Commission." This provision conflicts with Subsection 623(a)(4), which provides that a certification will become effective 30 days after the date it is filed unless the Commission finds that "the franchising authority **has** adopted or **is** administering regulations with respect to the rates subject to regulation . . . that are not consistent with the regulations prescribed by the Commission." (emphasis supplied). The Commission cannot make a determination that a franchising authority **has** adopted or **is** adopting regulations when the franchising authority has only certified that it **will** adopt such regulations.[64/]

Unless regulations are implemented by a franchising authority, prior to certification, that are consistent with regulations established by the Commission there is no assurance that a franchising authority will ever implement such regulations. It should be required to do so prior to its certification and to serve the operator with a copy of its regulations and its subsequent certification application to the Commission. This requirement will prevent a franchising authority from filing a certification and then failing to adopt regulations which are

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64/ The House Report contemplates that a franchising authority, at the time a certification is filed, will have already adopted the requisite regulations. The certification will take effect unless the FCC finds that the "regulations adopted by the franchising authority are not consistent with, or are not being administered with, the regulations prescribed by the FCC." House Report at 81.

in conformity with those adopted by the Commission, and thereby reduce the occasions on which cable operators are required to file petitions for revocation of certifications.

Alternatively, a franchising authority should be required to file a supplemental certification with the Commission after it has adopted regulations in conformity with the Commission's requirements.[65/] The failure to timely file the supplemental certification would automatically invalidate the initial certification. In any event, the franchising authority cannot be permitted to engage in any form of rate regulation unless and until it has adopted the necessary regulations and so informed the Commission. A franchising authority should be required to serve a copy of the supplemental certification and the regulations which it adopts on the operator at the time the supplemental certification is filed with the Commission.

B. The Commission Has Limited Jurisdiction To Regulate Basic Service Rates.

The Commission may regulate basic service rates only where a franchising authority's certification has been denied or revoked. Where a franchising authority does not file for certification, the Commission may not exercise authority to regulate basic rates.

65/ In the interim the franchising authority cannot be empowered to assert its rate regulation powers over the cable system; rate regulation that does not conform to the Commission's rules is prohibited.

Under Section 623(a)(6), the Commission has jurisdiction to exercise the franchising authority's regulatory jurisdiction[66] over basic cable service rates "[i]f the Commission disapproves a franchising authority's certification under [Section 623(a)(4)], or revokes such authority's jurisdiction under [Section 623(a)(5)]."[67] This is the only provision in the 1992 Act that authorizes the Commission to regulate basic rates. Although the Commission is obligated to implement regulations to insure that basic service rates are reasonable, its responsibility is limited.[68] Where a franchising authority with legal authority to regulate rates chooses not to apply for certification, the Commission may not regulate basic service rates.

The House Report supports this position. Section 623(a)(6) of the House bill "**specifies the scope of the FCC's authority** to regulate basic cable rates in lieu of a franchising authority. The FCC may exercise regulatory authority with respect to basic cable rates **only in those instances** where the franchising authority's certification has been disapproved or has been revoked and

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66/ A community's regulatory authority cannot be implied by general powers to grant franchises; it must be granted *expressly* by the state. If a state does not confer or withholds the power to regulate rates, the Commission may not certify a franchising authority to regulate rates. The state may choose to regulate rates itself, or retain a deregulated environment for basic cable service. Where a deregulated environment exists, neither a franchising authority nor the Commission may regulate rates.

67/ 47 U.S.C. § 543(a)(6).

68/ 47 U.S.C. § 543(b).

only until the franchising authority has qualified to exercise that jurisdiction by filing a valid certification."[69/]

Congress intended to leave the discretion of whether to regulate rates for basic cable service solely within the franchising authority's discretion, and nothing in the 1992 Act requires local authorities to seek certification if they are granted regulatory authority. If Congress had intended to give the Commission regulatory authority over basic rates where local franchising authorities elect not to become certified, then it would have expressly granted this authority in Section 623(a)(5).

C. A Stay Of The Certification Procedure Is Required Where It Cannot Be Determined That A Franchising Authority Is Qualified To Regulate Basic Service Rates.

Section 623(a)(4) of the 1992 Act provides that a certification shall be effective thirty (30) days after the date on which it is filed unless the Commission determines the certification fails to meet the requirements of Subsections 623(a)(4)(A)-(C). Thousands of franchising authorities will have the opportunity to file certifications on the effective date of the Commission's regulations, and the Commission does not have the ability to adequately review and act on each of these certifications. The filing of an opposition should therefore stay the 30-day period until the Commission has had an opportunity to determine whether a franchising authority has the legal authority to exercise

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69/ House Report at 81 (emphasis added).

jurisdiction which may only be exercised after a demonstration of compliance with the statute.

The Commission has the inherent authority to grant a stay of the certification process. In the absence of a stay, an operator will have no way to recoup lost revenues if a franchising authority denies a rate increase or orders an operator to adjust its rates to one of the benchmarks that the Commission may adopt, and it is later determined by the Commission that the franchising authority lacked jurisdiction to regulate rates. The failure to grant a stay in these circumstances would result in a fundamental violation of an operator's rights of due process and an unlawful taking of property.

Alternatively, the Commission may either delay the certification process so that it is able to process all certifications before a franchising authority is able to exercise rate regulation jurisdiction, or where an opposition to a certification has been filed, provide an automatic stay pending an appeal of any action taken by a franchising authority which prevents an operator from implementing a rate increase, or requires that an operator conform rates to a Commission benchmark.[70/]

D. Certification Notification.

The Commission proposes to require a franchising authority to notify each franchisee within ten days of the grant of a certification. CVI believes

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70/ After an opposition to a certification has been filed, an expedited pleading cycle should be established that will enable the Commission to reach a speedy determination on the contested certification.

that the Commission should publish a list of certifications that have been granted and denied in its daily Public Notice. This would afford all interested parties timely notice of the Commission's action. Where the Commission has disapproved a certification and notifies the authority of any revisions or modifications that are necessary to obtain approval, the Commission should provide the cable operator with a copy of the notification.

E. The Commission Must Find That A Cable System Is Not Subject To Effective Competition Before A Franchising Authority May Regulate Basic Service Rates.

In the *Notice*, the Commission proposes to permit franchising authorities to make an initial determination that a cable system is not subject to effective competition and to then incorporate that determination into the certification process. *Notice* at ¶ 17. This proposal is inconsistent with the Commission's obligations under the 1992 Act, and must be modified to lodge the responsibility for effective competition determinations with the Commission.

The 1992 Act is very specific. The rates for either basic cable service or cable programming service can be regulated only "[i]f the Commission finds that a cable system is not subject to effective competition[.]" 47 U.S.C. § 543(a)(2). The Commission cannot delegate that responsibility to any other party, nor may it, as the *Notice* proposes, treat a franchising authority's

determination as a finding under the 1992 Act.[71] Neither the Commission nor any franchising authority is entitled to regulate a system's rates until the Commission finds that the system is not subject to effective competition, even if a franchising authority's certification has gone into effect.

It also would be inappropriate to depend on franchising authorities to make a determination regarding effective competition.[72] Any franchising authority that files a certification request is declaring that it requests authority to regulate basic service. This creates a potential bias which makes suspect any franchising authority's determination that effective competition is not present.

The Commission should, in any event, require franchising authorities to provide sufficient information for the Commission to make a finding regarding the presence or absence of effective competition. The form proposed in the *Notice* merely asks the franchising authority to check a single space to indicate whether the franchising authority believes there is effective competition. *See Notice*, Appendix D. This procedure is totally insufficient to permit the Commission to make an independent determination as required under

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71/ The Commission's proposal would treat a franchising authority's determination regarding effective competition as if it were part of the franchising authority's certification request. The 1992 Act makes it clear that these are separate processes. Among other things, it specifically sets a 30-day consideration period for certifications, which does not apply to effective competition determinations. *See* 47 U.S.C. § 543(a)(4) (describing certification procedures). If Congress had intended for the processes to be combined, the statute would say so.

72/ Franchising authorities have no special expertise which allows them to determine if effective competition exists.

the statute whether effective competition exists. The Commission should modify the form so that the franchising authority must provide to the extent it is able to do so, information on each of the statutory criteria, including: (1) How many households subscribe to the cable system? (2) What other multichannel video providers serve the franchise area, how many households can receive their services, and how many households subscribe? (3) Does the franchising authority operate a competing video programming service and, if so, how many households can receive that service? *See* 47 U.S.C. § 543(l)(1). Without this information, the Commission cannot begin to determine whether there is effective competition. There may be many instances, in fact, when the franchising authority cannot provide the required data and the Commission will need to employ its own resources to make a determination.

The Commission should also establish certain presumptions for a determination regarding effective competition. It should establish that certain services automatically meet the 1992 Act's requirement that an alternative multi-channel provider be available to 50 percent of the homes in a franchise area before it can be considered in effective competition calculations. *Id.* The Commission should establish a presumption that all services delivered by satellite are available to 100 percent of a franchise area. This same presumption should apply to areas that are served by wireless cable operators. This presumption should apply to any alternative video service like DBS or wireless cable if its signal is available throughout the franchise area. Indeed, the Commission has made similar assumptions in its earlier regulations on effective competition.

The Commission also must establish procedures by which operators will be able to ascertain whether they are subject to effective competition within a community. Other video programming distributors, including wireless cable, SMATV, DBS, and video dialtone providers are not required to provide local franchising authorities with any information regarding service in the community. Only where another cable operator provides service in the franchise area would a local franchising authority have knowledge.[73/] Therefore, the Commission must institute annual reporting requirements for all multi-channel video programming distributors necessary to document the amount of service provided in the community.[74/] There is no practical means by which a cable operator, a franchising authority, or even the Commission itself, can reasonably make a determination regarding the extent or presence of effective competition within a specific area absent such a requirement. These reporting requirements are absolutely essential; rate regulation of systems that are subject to effective competition is expressly prohibited under the Act. In the interim, pending

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73/ All multichannel video providers should be included in the effective competition determination, and they should be counted cumulatively. The Commission questions whether video dialtone providers and television stations that broadcast on more than one channel should also be included in an effective competition analysis. Video dialtone subscribers will have a multiplicity of viewing options, and should be included in this calculus. The onset of multichannel delivery may also dramatically increase the number of broadcast signals that will be available, and the Commission should retain the flexibility to deal with this phenomenon.

74/ The Commission is charged with the responsibility for determining the presence or absence of effective competition as that term is defined in the Cable Act. It is generally empowered by the Communications Act to adopt such rules and regulations as are necessary to discharge its responsibilities under the Act.